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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CHRISTOPHER R. COOK, an  
individual; DEBRA K. POWERS-COOK,  
an individual,

Plaintiff,

vs.

WELLS FARGO BANK, a foreign  
corporation authorized to do business in  
California; DOES 1 through 10 inclusive,

Defendants.

CASE NO. 09cv2757 WQH (NLS)

**ORDER**

HAYES, Judge:

The matter before the Court is Plaintiffs' Motion for Leave to File Third Amended Complaint. (ECF No. 21).

**BACKGROUND**

On October 29, 2009, Plaintiffs initiated this action by filing a Complaint in the Superior Court for the State of California, County of San Diego. (ECF No. 1 at 2). On December 9, 2009, Defendant Wells Fargo Bank ("Wells Fargo") filed a Notice of Removal. (ECF No. 1). On December 17, 2009, Defendant filed a Motion to Dismiss Plaintiffs' Complaint. (ECF No. 4). On March 26, 2010, the motion was granted and Plaintiffs were given leave to amend. (ECF No. 9).

On April 20, 2010, Plaintiffs filed a First Amended Complaint. (ECF No. 10). On May 4, 2010, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint.

1 (ECF No. 11). On July 7, 2010, this Court granted the motion to dismiss finding that  
2 Plaintiffs' Truth in Lending Act claim was not time barred, but the allegation that Plaintiffs  
3 had sufficient funds "at their disposal" to tender was insufficient to state a claim. (ECF No.  
4 15 at 6). Plaintiffs were permitted to file a motion for leave to amend the complaint.

5 On August 6, 2010, Plaintiffs filed a Motion for Leave to File a Second Amended  
6 Complaint ("SAC"). (ECF No. 16). In the proposed SAC, Plaintiffs alleged that Plaintiff  
7 Chris Cook was willing to sell his interest in his business and liquidate his retained  
8 earnings to tender, and that amount was "approximately \$1,000,000.00." (ECF No. 16-1 at  
9 13). Defendant contended that Plaintiffs' proposed SAC was futile because Plaintiffs'  
10 tender offer fell "approximately \$329,000 short of full and complete tender." (ECF No. 17  
11 at 3). In Plaintiffs' Reply, Plaintiffs argued that the value of the business sale and  
12 liquidation of retained earnings totaled \$1,351,619.74.

13 On November 17, 2010, this Court denied Plaintiffs' Motion for Leave to File a  
14 Second Amended Complaint finding that, "Plaintiffs no longer seek to file the proposed  
15 Second Amended Complaint which is the subject of this Motion." (ECF No. 20 at 3).

16 On December 21, 2010, Plaintiffs' Motion for Leave to File Third Amended  
17 Complaint ("TAC") was filed. (ECF No. 21). In the proposed TAC, Plaintiffs alleges that  
18 "Plaintiffs are willing, able and prepared to tender a principal amount after the appropriate  
19 credits are made for interest, finance charges and any other fees or payments applicable  
20 under the statute." *Id.* at 16. Plaintiffs allege that, "[i]f California Correctional Foods Inc.  
21 were sold on the open market, Plaintiffs' interest in the purchase price would be  
22 approximately \$995, 923.90." *Id.* Plaintiffs allege that Plaintiffs would also be "paid their  
23 equity and retained earnings, which are valued at approximately \$355,695.84 ...." *Id.* "The  
24 combined total equals \$1,351,619.74." *Id.* Plaintiffs allege that the sum is "sufficient to  
25 rescind the loan at the center of this dispute after all appropriate credits have been taken  
26 into consideration." *Id.*

27 On January 4, 2011, Defendant Wells Fargo filed an Opposition to Plaintiffs'  
28 Motion for Leave to File Third Amended Complaint. (ECF No.24). Defendant contends

1 that Plaintiffs lack a “present ability to tender in full without any conditions.” *Id.* at 2.

2 Defendant contend that “Plaintiffs now owe more than \$1.5 million on their loan.” *Id.*

3 On January 10, 2011, Plaintiffs filed a Reply. (ECF No. 26).

#### 4 DISCUSSION

5 Rule 15 of the Federal Rules of Civil Procedure mandates that the court “should  
6 freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a). “This policy  
7 is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
8 1048, 1051 (9th Cir. 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962),  
9 the Supreme Court offered several factors for district courts to consider in deciding whether  
10 to grant a motion to amend under Rule 15(a):

11 In the absence of any apparent or declared reason—such as undue  
12 delay, bad faith or dilatory motive on the part of the movant,  
13 repeated failure to cure deficiencies by amendments previously  
14 allowed, undue prejudice to the opposing party by virtue of  
allowance of the amendment, futility of amendment, etc.—the leave  
sought should, as the rules require, be ‘freely given.’

15 *Foman*, 371 U.S. at 182; see also *Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th  
16 Cir. 2004) (citing *Foman* factors).

17 “Not all of the [*Foman*] factors merit equal weight. As this circuit and others have  
18 held, it is the consideration of prejudice to the opposing party that carries the greatest  
19 weight.” *Eminence Capital*, 316 F.3d at 1052 (citations omitted). “The party opposing  
20 amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*, 833  
21 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing of any of the  
22 remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting  
23 leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

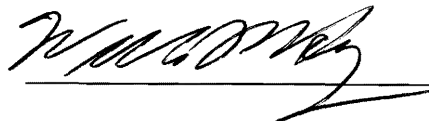
24 Defendant contends that “after four attempts to adequately allege tender, the  
25 proposed TAC still fails to comply with the requirement that Plaintiffs allege a present  
26 ability to tender in full without any conditions.” (ECF No. 24 at 2). Defendant also  
27 contends that granting Plaintiffs leave to amend would be futile. *Id.* at 3.

1 After consideration of the submissions of the parties, the Court concludes that  
2 Defendant has not made a sufficiently strong showing of the *Foman* factors to overcome  
3 the presumption under Rule 15(a) in favor of granting leave to amend. *See Eminence*  
4 *Capital*, 316 F.3d at 1052. The Court will defer consideration of any challenge to the  
5 merits of the proposed third amended complaint until after leave to amend is granted and  
6 the amended pleading is filed. *See Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-  
7 4708, 2006 WL 3093812, at \*2 (N.D. Cal., Oct. 31, 2006) (“In view of Rule 15(a)’s  
8 permissive standard, courts ordinarily defer consideration of challenges to the merits of a  
9 proposed amended pleading until after leave to amend is granted and the amended pleading  
10 is filed.”).

#### 11 CONCLUSION

12 IT IS HEREBY ORDERED that Plaintiffs’ Motion for Leave to File Third  
13 Amended Complaint (ECF No. 21) is GRANTED. Plaintiffs shall file the proposed Third  
14 Amended Complaint attached to Plaintiffs’ Motion as Exhibit A by no later than ten days  
15 from the date of this Order.  
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17  
18 DATED: 3/25/11



19 WILLIAM Q. HAYES  
20 UNITED STATES DISTRICT JUDGE  
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